SUPREME COURT, U. S.

Nos. 81, 84, and 114

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

GERALD TOMASZCK AND JOSEPH D'ARGENTO, PETITIONERS

v.

UNITED STATES OF AMERICA

MIKE LAJOY, PETITIONER

v.

UNITED STATES OF AMERICA

PATRICK SCHANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR DEFENDANTS GERALD TOMASZCK and JOSEPH D'ARGENTO ONLY

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The Scheffer Press, Inc.—ANdover 3-6850

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II.

THE COMPULSORY EXHIBITION OF THE PERSONS AND VOICES OF DEFENDANTS TOMASZCK AND D'ARGENTO IN A LINEUP FOLLOWING A SUPPRESSED INDICTMENT PURSUANT TO THE GOVERNMENT'S PLANS TO CONDUCT IT SO THAT ATTORNEYS WOULD NOT BE GIVEN AN OPPORTUNITY TO ATTEND VIOLATED DEFENDANTS' RIGHTS TO THE EFFECTIVE AID OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Defendants Tomaszck and D'Argento argued that the pretrial and in trial identifications were so tainted that their rights were violated not only under the Sixth Amendment but under the Fourteenth Amendment (Pet. Cert. 2, 10).

Stovall v. *Denno*, 18 L.Ed. 1195, forecloses their claim of violation of the Sixth Amendment, but re-emphasizes that the lineup may be so conducted as to violate a person's *rights* under the *due* process clause of the Fourteenth Amendment.

Illustrative that "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law" (Stovall, p. 1206) is the testimony of the Government's witness, Adele Smith. When viewing Tomaszck at the lineup she placed a "question mark" on her card (Tr. 2844), that the reason she placed the "question mark" on the card was that as far as she knew there might be 489,000 people in Chicago who more nearly represented or looked like that individual than the one she picked out and that all she understood to do was to pick out who more nearly resembled the individual from those present in the line (Tr. 2862), that she could not positively

say that Tomaszck was the man who crossed her lawn (Tr. 2859), and the "question mark" stayed on her card because the man walked past her window a little too fast to make her positive of anything (Tr. 2874), and that although she told the agent the man looked about 38, that Tomaszck does not look 38 years of age (Tr. 2877). Nevertheless, this witness when testifying in Court on direct examination pointed out the defendant Tomaszck and identified him as the man she had seen outside her window (Tr. 2834) while talking on the telephone (Tr. 2826).

Government's witness Beck before going to the lineup was not told he was to view possible suspects, he was told that he was to view persons who had already been indicted (Tr. 389).

Government witness Hauger stated between 11:45 a.m. and 12:00 p.m. she did see a man walking south on Dora, on the east side of Dora, in front of her house who was not walking hurriedly (A. 27-28). She then saw this man walk east on Minneapolis while she was preparing lunch and only saw the profile of the man (A. 28). The following day when shown pictures of Tomaszck by agents she could not describe, she said that the pictures resembled the man she saw walking by her home (A. 28). While being transported to the showup four days later she was told by the agents that arrests had been made and she might have been told that some people were indicted (A. 28).

The purported identifications of Tomaszck were made under circumstances so unfair as to deny him due process of law guaranteed by the Fourteenth Amendment.

CONCLUSION

For the reasons advanced defendants Gerald Tomaszck and Joseph D'Argento request that the judgments entered as to these defendants be reversed.

Respectfully submitted,

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